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IN THE

Supreme Court of the United States

October Term, 1963

No. 568

ANGELO LOICANO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF—IN REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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1. This Court's decision of October 21, 1963, in No. 45, *Salvatore Panico* v. *United States*, granting the writ of certiorari, vacating the judgment of the Court of Appeals, and remanding the case to the District Court, has a significant impact upon the within certiorari petition of Loicano. In this respect the situation is similar to that in the case of the herein companion certiorari of Carmine Panico (No. 346), the brother of the petitioner Salvatore Panico in No. 45. We refer to the exceedingly close connection between Loicano's case and the case of the Panico brothers in the eyes of the jurors at the trial, thanks to the extraordinary way in which the Trial Judge tied together these three defendants through the forced assignment of counsel. Petitioner Loicano respectfully adopts, insofar as applicable to his case, the suggestions offered on this subject at pp. 1-2 of the "Petitioners' Reply Brief" in No. 346 (*Carmine*

Panico v. *United States*); and we respectfully add that the impact upon Loicano's case of this Court's above mentioned ruling in No. 45 (*Salvatore Panico* v. *United States*) is perhaps even more significant than in the case of Salvatore Panico's brother Carmine (No. 346), for here we have not only the overall question of denial of fair trial owing to the failure to sever the indicatedly insane Salvatore Panico whose atrocious conduct was bound to prejudice the jury against all of the other defendants and especially against the two defendants with whom Salvatore was most closely connected in the jury's eyes through the grotesque arrangements for assigned counsel; in Loicano's case we have the additional aggrieving circumstance that his very right to counsel was in itself *pro tanto* additionally impaired as the obnoxiousness of Salvatore Panico's conduct inevitably intensified the conflict of interests between Loicano and the Panicos.

2. The Government's description, in its Brief in Opposition, of the testimony which is supposed to have placed petitioner Loicano in the conspiracy (Br. in Opp. pp. 3-4), and its argument on this subject (*id.*, pp. 6-7), do not defeat our contention that the evidence was insufficient for submission to the jury. The Government does not try to controvert our demonstration that Loicano was never said to have received narcotics or to have had possession of narcotics, and indeed that he was never shown even to have been present at "Rocco's On The Hill" (the sole place where Loicano was sought to have been linked with the "route" or "run" phase of the conspiracy under the Government's theory of the case). The Government nevertheless tries to link Loicano with this phase by playing up the altogether amorphous item about Mancino's unelaborated

characterization of Loicano ("Puggy") as "Rocco's" "partner", an item whose poor probative quality was shown in our petition for certiorari herein (pp. 11-12, 16-17, 44). Likewise ineffectual is the Government's treatment of the phase in which "Rocco" and Loicano are supposed to have invited the accomplice witness Smith to start a new narcotics "run" for them from Canada. This argument of the Government (Br. in Opp., pp. 6-7) starts out, not with any attempt to show that Loicano was already a member of an antecedent conspiratorial group in that he had received or possessed narcotics as a "route" or "run" participant (this, the Government evidently realizes, is hardly the best link in its chain of "proof" against Loicano). Instead, the Government starts out with the "partner" theme, and then goes on to say (*ibid*):

> "* * * On the basis of that testimony, even without more, the jury was entitled to conclude, not only that petitioner was Rocco's partner, but that both were parties to the overall conspiracy charged in the indictment. It matters not whether the unsuccessful attempt to solicit Smith's services had in view merely a modification of the existing importation scheme, as the court below declared, or an altogether new and competing venture. In either case, the jury could reasonably infer that unless Loicano was part of the existing conspiracy and therefore aware of Smith's role as courier in it, he would not have sought to enlist Smith as a deliveryman in a new importation operation. If additional proof were needed, it was supplied by Smith's further testimony that Mancino marked one of the cellophane packages (obviously containing heroin) for 'the Rock'; that Mancino had announced, on two occasions, that he was on his way to make a 'run' to 'Rocco's on the Hill', and that in

> one instance Smith had accompanied Mancino to the top of the hill while he made what appeared, in the circumstances, to be a delivery. Since petitioner was Rocco Sancinella's partner, the foregoing evidence viewed as a whole, amply supports the conclusion that petitioner, like others along Smith's route, was a recipient of the narcotics, illegal importation of which was the object of the charged conspiracy."

Thus we see the Government first reversing the only supposedly logical sequence of the alleged happenings involved by reasoning backwards from the "partner" theme to the "route" theme, and then circularly transposing and retransposing these two themes so as to cause it to appear that they logically support each other. This is a not unfamiliar forensic device, to play down the weak point in one's argument until the supposedly stronger one has been adduced, then to haul out the weaker point, and then to rotate (rapidly) the two points so as to produce a beguiling blur.

3. We had thought that, before this Court, the rush-rush prosecutive methods which we mentioned in our petition for certiorari as having plagued this case in the lower courts, would no longer be a problem. Unfortunately, it seems that the monumental size of the records of the two trials in this case has perhaps affected the reliability of the Government's presentation before this Court. Already once before now it has been necessary for the Government to advise this Court, in the instant proceeding, that it had mis-stated the record in an important respect; we refer to the Government's erroneous statement, in its main Brief in Opposition (p. 6), subsequently corrected, that certain named defendants had been convicted of contempt during the first trial, whereas in fact this was not true of several of the defen-

dants thus named by the Government. The Herculean difficulties of this massive trial record have apparently still not been overcome by the Government's attorneys with perfect mastery, because now in the Brief in Opposition to Loicano's petition there appears the outright mistsatement that "During the period of Mr. Todaro's representation, the Government, in compliance with the Court's instructions, confined itself to presenting evidence relating to the substantive counts, in none of which petitioner (Loicano) was named" (p. 8). This distressing error by the Government, which involves a crucial part of the issue of denial of Loicano's right to counsel, is really hard to understand, because we took the most explicit pains in our petition for certiorari (p. 33)* to point out that the entire direct testimony of the accomplice witness Edward Lawton Smith which purported to inculpate Loicano in the conspiracy had been taken during the absence of Mr. Cosentino despite defense efforts to dissuade the prosecution from going into this area prior to Mr. Cosentino's return to the trial, which was expected, moreover, within not more than one to two trial days—i.e. Smith's aforesaid testimony was taken on April 12, 1962, a Thursday, and it was already then officially expected that Mr. Cosentino would be back in Court on the next Monday, April 16 (Pet., p. 33).

* In fact, we *italicized* the item in our petition, the single instance in the petition where we resorted to italics.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted; and that, in any event, the petition should not be denied until after there shall have been reached a final adjudication or other disposition of the now renewedly pending (pursuant to this Court's decision of October 21, 1963 in No. 45) question of the mental competency of Salvatore Panico.

Respectfully submitted,

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